Tidewater Construction Corp. *and* International Union of Operating Engineers, Local No. 147 a/w International Union of Operating Engineers, AFL–CIO. Case 5–CA–25463

March 17, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On May 2, 2001, the National Labor Relations Board, by a three-member panel,[1] issued a decision in this proceeding, finding that the Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to consider hiring certain former employees as temporary replacements during a lockout. 333 NLRB 1264. The Board, therefore, dismissed the complaint in its entirety. Member Liebman dissented.

The Union filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. On July 9, 2002, the court vacated the Board's decision, and remanded the case to the Board for further proceedings consistent with its opinion. *International Union of Operating Engineers v. NLRB*, 294 F.3d 186.

By letter dated November 22, 2002, the Board notified the parties that it had accepted the remand and invited the parties to file statements of position. The Respondent, the General Counsel, and the Union filed statements of position.

The Board, by a three-member panel, has reconsidered this case in light of the court's remand and the parties' statements of positions. For the reasons discussed below, we have decided to reverse the Board's original decision and find the Section 8(a)(3) and (1) violation as alleged.

The relevant facts may be summarized briefly. The Respondent is a construction industry employer whose operating engineer employees selected the Union as their collective-bargaining representative in an election conducted by the Board in March 1994.

Collective-bargaining negotiations began immediately after the Union was certified, but reached impasse by October 1994, and resulted in an economic strike. The strike lasted until December 1994 when the Union offered unconditionally, on behalf of 25 named strikers, to return to work. The Respondent declined the Union's offer and imposed a lockout of unit employees pending the Union's acceptance of the final contract offer that the Respondent had submitted to the Union prior to the strike.

The Respondent composed a list of individuals not to be hired during the lockout. The list included the names of the 25 strikers for whom the Union had made an unconditional offer to return to work. It was the Union's understanding that these 25 strikers were the only individuals being locked out. "Unbeknownst to the Union, however," the lockout list also included "all the employees [on the *Excelsior* list] who were eligible to vote in the representation election conducted 9 months earlier . . . ." 333 NLRB at 1268.[2] There is no dispute that all those on the lockout list were known by the Respondent to be members of the Union.

The Respondent asserted during the unfair labor practice hearing that its lockout list contained only the names of the 25 strikers and those on the *Excelsior* list. By the end of the hearing, however, the Respondent conceded that the lockout list contained the names of 16 additional individuals who were neither strikers nor named on the *Excelsior* list. The Respondent proffered several reasons for the inclusion of some of these names on the lockout list, but, ultimately, was unable to explain the inclusion of 10 of the 16 additional names.

During the lockout, the Respondent placed classified advertisements in local newspapers seeking applicants for employment. The Respondent hired 40 unit replacement employees, none of whom were on the lockout list or were known by the Respondent as members of the Union at the time they were hired. One of those hired, however, was Terry Williams, a business representative of the Union. Approximately 2 days after reporting to work, Williams was recognized by one of the Respondent's job superintendents, who asked Williams whether he was the "only one that slipped through the cracks."[3]

Among those who applied for work in response to the job advertisements were six union members whose names were on the *Excelsior* list and, hence, on the lockout list.[4] The Respondent told them there was no work available and refused to consider them for employment. They were not told that their inclusion on the lockout list was the reason they were not being considered for hire.

In its original decision, the Board dismissed the complaint allegation that the lockout was unlawful and that the Respondent violated Section 8(a)(3) and (1) by refus-

[1] Chairman Truesdale and Members Liebman and Hurtgen.

[2] An *Excelsior* list is a list of employees eligible to vote in a representation election conducted by the Board. *Excelsior Underwear*, 156 NLRB 1236, 1239–1240 (1966).

[3] Steven Corbett was the only other union member who was hired during the lockout, but it is undisputed that the Respondent did not become aware of his union status until after he was hired.

[4] The six applicants were Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trauger.

ing to consider for employment the six union members on the *Excelsior* and lockout lists who applied for work. In agreement with the judge, a Board majority rejected the argument that the lockout was unlawful insofar as it extended beyond the 25 current employees who struck, to encompass former employees on the *Excelsior* list, including the six job applicants. The Board majority found that, although the Respondent knew that everyone on the *Excelsior* list was a union member, having hired them from the Union's hiring hall, the Respondent did not lock them out for the unlawful reason that they were union members but, rather, for the lawful reason that they reasonably could be considered bargaining unit members who supported the Union's bargaining position. Accordingly, in concluding that the six job applicants were lawfully locked out, rather than denied consideration for employment in violation of Section 8(a)(3), the Board majority stated that it could "not join . . . dissenting colleague [Member Liebman] in finding that the Respondent's lockout of those on the [*Excelsior*] list reveal[ed] a discriminatory antiunion purpose rather than a legitimate purpose of pressuring the Union and those who support it to accept the Respondent's terms for a collective-bargaining agreement." 333 NLRB at 1265.

In dissent, Member Liebman would have found that the Respondent's extension of the lockout to all of its former employees on the *Excelsior* list "went well beyond bringing legitimate economic pressure to bear in support of its bargaining demands . . . [and, thus] failed to establish that its conduct had a legitimate business justification." 333 NLRB at 1266. Because, in her view, the evidence also demonstrated that the inclusion of the six applicants in the lockout was motivated by antiunion considerations, i.e., "the applicants' membership in and perceived support for the Union," Member Liebman would have found that the Respondent's refusal to consider the six applicants for employment violated Section 8(a)(3) and (1). Id. at 1267.

In vacating the Board's decision, the D.C. Circuit "h[e]ld that the Board failed adequately to explain why evidence presented by the Union did not demonstrate that [Respondent] had unlawfully refused to consider the applicants due to antiunion animus." *Operating Engineers v. NLRB*, supra, 294 F.3d at 187. The court found that, "[i]n particular, the Board failed adequately to consider three indications that [Respondent] was motivated by antiunion animus." Id. at 189. "First," the court agreed with the Union that the "Board unreasonably disregarded [Respondent's] inability to explain why 10 of the 16 individuals who were neither strikers nor on the *Excelsior* list were included on the lockout list." Noting that the Board's justification for refusing to infer union animus from this failed explanation was because there was no evidence that the 10 were union members or applied for employment, the court stated that:

> [w]hether the 10 applied for employment, however, is irrelevant to whether their unexplained inclusion on the list bespeaks antiunion animus. Indeed, it is also irrelevant whether they were actually members of the Union, so long as [Respondent] thought they were. [Id. at 189–190.]

"Second," the court noted that the Respondent "falsely told each of the applicants 'there was no work available' rather than telling them that they were locked out, as it now claims they were." Id. at 190. Citing Board precedent which would support an inference that the Respondent's false statements concealed an unlawful motive, the court questioned why the Board did not find that the Respondent's "misrepresentation" constituted evidence of union animus. Id.

Finally, the court found that the Board failed to explain adequately why the Respondent's lockout of everyone on the "outdated" 10-month old *Excelsior* list did not also evidence union animus. 294 F.3d at 191. In this regard, the court pointed out that the Respondent knew that everyone on that outdated list was a union member and queried why the Board did not "require the use of an updated list" that was compiled closer in time to the lockout. Id.

DISCUSSION

This case involves a lockout in response to union efforts to obtain a contract. Notwithstanding the lockout, the Respondent hired some employees. The issue is whether the Respondent, in refusing to consider hiring certain job applicants, was *motivated* by union animus. As the D.C. Circuit explained in another lockout case:

> An employer does not violate section 8(a)(3) every time it acts in a manner that may affect union activity. Rather, an employer's action violates section 8(a)(3) only if it acts specifically with the intent or purpose of encouraging or discouraging union membership. Thus, "a finding of a violation under this section will normally turn on the employer's motivation."

International Paper Co. v. NLRB, 115 F.3d 1045, 1048 (1997), citing *American Ship Bldg. v. NLRB*, 380 U.S. 300, 311 (1965).

In *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), the Supreme Court articulated guidelines for assessing employer motivation in the context of asserted 8(a)(3) violations. Specifically, the Court explained that there are two categories of discriminatory conduct which, depending on the nature of their impact on employee rights, require a different analysis in assessing employer motivation.

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

NLRB v. Great Dane Trailers, 388 U.S. at 34 (emphasis in original).

In her dissenting opinion in the Board's original decision, Member Liebman analyzed the Respondent's conduct under the "comparatively slight" prong of the Court's *Great Dane* analysis. For the purpose of our analysis, we too shall treat the Respondent's conduct as having a comparatively slight impact on employee rights. As the Court made clear in *Great Dane*, an employer whose conduct has a comparatively slight impact on employee rights can avoid liability under Section 8(a)(3) if it comes forward with a "legitimate and substantial business justification []" for its actions. 388 U.S. at 34. But even if the employer meets this threshold burden, a violation will still be found if the evidence establishes that the employer acted with antiunion motivation. Id. As the D.C. Circuit explained in *International Paper Co. v. NLRB*, supra, 115 F.3d 1052 at fns. 5 and 6, "[i]f an employer commits a violation with comparatively slight effects but produces evidence of a substantial and business justification it may yet violate section 8(a)(3) if there is 'an affirmative showing of improper motivation.'"

As described above, the court in this case held that the "Board failed adequately to consider three indications that [Respondent] was motivated by antiunion animus." 294 F.3d at 189. Accordingly, under the "comparatively slight" *Great Dane* analysis, we shall assume, arguendo, that the Respondent satisfied its business justification defense for failing to consider the six job applicants for employment during the lockout, and proceed directly to the question whether a 8(a)(3) violation nonetheless should be found based on the indicators of possible antiunion animus cited by the court.

Having reconsidered the case in light of the court's decision, we find that the Respondent's treatment of the six job applicants was unlawful. In finding the violation, we assume arguendo that the Respondent could lock out employees on the basis of their being in the unit, and that those employees on the Respondent's *Excelsior* list fell within that category. However, as discussed below, the Respondent's lockout and refusal to consider the six job applicants for employment was on the basis of their union membership, a protected activity that is not necessarily congruent with unit membership. We therefore conclude that the Respondent's conduct was motivated by animus toward union members. Chief among our reasons for this conclusion is the second indicator of the Respondent's possible union animus discussed by the court—the false statements made to the six when they applied for work that they would not be hired because of a lack of available jobs. The court questioned why, "[f]rom this misrepresentation," the Board declined, even though it could have legally done so, to infer an unlawful motive by the Respondent. We make that inference now.

The Board has long applied the maxim, first articulated by the Ninth Circuit in *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (1966), and adopted by the Board in *Wright Line*, 251 NLRB 1083, 1088 fn. 12 (1980) enfd. 662 F.2d 899 (1st Cir. 1981) that:

> If [a trier of fact] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference.

Shattuck Denn, 362 F.2d at 470. By definition, an employer's proffer of a lawful, but false, reason for an alleged act of Section 8(a)(3) discrimination constitutes evidence that the proffered lawful reason was pretextual, i.e. it either did not exist or was not, in fact, relied upon, thereby permitting the *Shattuck Denn* inference that the employer was shielding an illicit motive. *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *LaGloria Oil & Gas Co.*, 337 NLRB 1120, 1124 (2002). Applying this principle here, we infer from the Respondent's pretextual claim of job unavailability, at a time when it was considering and hiring other applicants, that it was attempting to conceal that union animus—specifically, the union membership of the six job applicants—was its true motivation in refusing to consider them for employment.[5]

The best evidence supporting this inference lies, as in *Shattuck Denn*, in "surrounding facts," particularly the first evidentiary factor pointed out by the court as possibly "bespeak[ing] antiunion animus," i.e., the unexplained inclusion of 10 individuals on the Respondent's

[5] We note that by citing *Property Resources Corp.*, 863 F.2d 964, 967 (D.C. Cir. 1988), the D.C. Circuit in this case specifically endorsed the principle of *Shattuck Denn*. See 294 F.3d at 190. See also *Southwest Merchandising Corp. v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995), approving application of *Shattuck Denn* in cases, as here, alleging a refusal-to-consider violation.

lockout list who were neither strikers nor on the *Excelsior* list. 294 F.3d at 189. The judge in the underlying Board decision found that the Respondent, after "numerous shifts in position," never provided a "credible" reason for the inclusion of the 10 in the lockout list and stated that he "might on that basis be inclined to find a violation." 333 NLRB at 1269–1270. He declined to do so, however, because "there was no proof that the 10 were all Union members [or] . . . applied for employment." Id. at 1270.

We agree with the court, however, that what really "counts" is not whether the 10 applied for work or were "actually members of the Union" but, rather, whether the Respondent "thought they were." 294 F.3d at 190. That would bespeak union membership as the factor motivating the Respondent's inclusion of the 10 on the lockout list, and support the inference that the same union animus motivated the Respondent's refusal to consider the 6 union applicants for employment. As noted by the court, the Respondent "certainly seem[ed] to [have] . . . thought the 10 individuals were members of the Union," as indicated by documentary records that it maintained which identified all of them as "Operating Engineers Local 147—LOCKED OUT EMPLOYEE." Id. Accordingly, as suggested by the court, we find that the Respondent's placement of the 10 names on its not-to-be-hired lockout list was motivated by its belief that they were all union members and that this evidence of union animus sustains the finding of unlawful motivation with respect to the Respondent's refusal to consider the 6 applicants for employment.[6]

Although not discussed by the court, we think additional evidence of the Respondent's unlawful motive lies in the Respondent's comments to Terry Williams during the lockout. As discussed above, Terry Williams was a union member and a business representative hired during the lockout. Within days of reporting to work, the Respondent's craft superintendent recognized Williams and asked whether there were other union operators working for the Respondent, or whether he was the only one who had "slipped through the cracks."

We find that this remark made to Williams further demonstrates the Respondent's unlawful motive during the lockout of avoiding consideration for employment of anyone who was a member of the Union. Although this objective failed with respect to Williams, the remark made to him by the Respondent's superintendent about "slipping through the cracks" clearly revealed the existence of a nonunion hiring policy maintained by the Respondent during the lockout, and that Williams' hire was simply a mistake.

In sum, for the reasons discussed above, we find, contrary to the Board's original decision, that the Respondent was motivated by union animus in declining to consider the six union applicants for employment during the lockout.[7] We conclude, therefore, that the Respondent violated Section 8(a)(3) and (1) and we shall remedy the violation as set forth below.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we will order it to cease and desist and take certain affirmative action necessary to effectuate the policies of the Act.

The Respondent shall be ordered to consider discriminatees Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trauger for future employment in positions for which they applied or substantially equivalent positions, in accord with nondiscriminatory criteria, and notify them and the Union and the Regional Director for Region 5 of such future job openings. If it is shown at a compliance stage of this proceeding that, but for the failure to consider them, they would have been selected for any other openings, the Respondent shall be ordered to hire them for any such positions and make them whole, for any loss of earnings and benefits that they may have suffered due to the unlawful actions taken against them, in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, we shall order the Respondent to remove from its files any reference to its refusal to consider for employment the discriminatees.

ORDER

The National Labor Relations Board orders that the Respondent, Tidewater Construction Corporation, Virginia Beach, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider applicants for employment because they are, or because they are believed

[6] Chairman Battista does not agree that this evidence shows that the Respondent believed that the 10 employees were union members. Rather, it simply shows that the Respondent believed that they were locked out.

[7] In light of the reasons on which we base our finding of union animus, we find it unnecessary to decide the other two questions presented by the court: whether union animus may also be inferred from the Respondent's use of an outdated *Excelsior* list in deciding who to lock out; and the failure to affirmatively tell the six job applicants that they were locked out so that, in accord with *Eads Transfer, Inc.*, 304 NLRB 711 (1991), enfd. 989 F.2d 373 (9th Cir. 1993), they could consider the options available to them as locked out individuals.

to be, members of the International Union of Operating Engineers, Local No. 147.

(b) In any like or related manner interfering with, restraining, or coercing applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Consider discriminatees Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trauger for future employment in positions for which they applied, in accord with nondiscriminatory criteria, and notify the discriminatees and the Union and the Regional Director for Region 5 of such openings in positions for which the discriminatees applied, or substantially equivalent positions, in the manner set forth in the Remedy section of this Decision and Order.

(b) Make whole Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trauger for any loss of earnings and other benefits suffered because of the discriminatory refusal to consider them for employment in the manner set forth in the Remedy section of this Decision and Order.

(c) Within 14 days from the date of this Order, notify Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trauger in writing that any future job application will be considered in a nondiscriminatory way.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider, and within 3 days thereafter notify Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trauger in writing that this has been done and that the refusals to consider will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional times as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Virginia Beach, Virginia jobsites and other jobsites within the jurisdiction of the Union the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and applicants are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business, or closed a facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 16, 1994.

(g) Within 21 days after service by Region 5, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 17, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT fail and refuse to consider applicants for employment because they are, or because we believe them to be, members of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights protected by the Act.

WE WILL consider discriminatees Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trauger for future job openings in accord with nondiscriminatory criteria, and notify them, the International Union of Operating Engineers, Local 147, and the Regional Director for Region 5 of future openings in positions for which the discriminatees applied or substantially equivalent positions.

WE WILL make whole, with interest, Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trauger for any losses they may have suffered by reason of our discriminatory refusal to consider them for employment.

WE WILL, within 14 days of the Board's Order, notify Clarence Ellers, DeAnn Roche, Donald Savage, George Stapleford, Ronald Thompson, and Bruce Trauger in writing that any future job application will be considered in a nondiscriminatory way.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to consider for employment the above named individuals and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to consider them for employment will not be used against them in any way.

TIDEWATER CONSTRUCTION CORPORATION